No. 14-940

IN THE

Supreme Court of the United States

SUE EVENWEL, *et al.*,

Appellants,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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INTRODUCTION

Appellants' Jurisdictional Statement ("Statement") explained that the decision below would allow the Texas Legislature to adopt "a Senate map containing 31 districts of equal total population without violating the one-person, one-vote principle—even if 30 of the districts each contained one voter and the 31st district contained all other voters in the State." Statement 3. While Appellees ("Texas") would not directly respond to this hypothetical, the Motion to Dismiss or Affirm ("Motion") makes plain that Texas believes such a plan would survive review under the Equal Protection Clause. The constitutionality of that radical proposition clearly is a substantial federal question. The Court should note probable jurisdiction and set the case for oral argument.

I. Texas's Arguments For Why This Appeal Does Not Present A "Substantial" Question All Miss The Mark.

There is no doubt the issue this appeal raises — whether a state must apportion its legislature in a way that protects the right of voters to an equal vote — is a substantial question. That is the only issue before the Court at this stage of the proceedings. Thus, the Court should grant plenary review. Statement 12-16.

Texas does not actually disagree. Rather, Texas argues that *Burns v. Richardson*, 384 U.S. 73 (1966), already decided the concededly substantial question that otherwise would need resolution here. Motion 6-9. According to Texas, *Burns* holds that "the Equal Protection Clause does not mandate any particular

apportionment base" and thus does not protect voters from having their votes debased through apportionment. *Id.* 6. As a result, Texas argues, "[t]here is no unsettled question for this Court to consider." *Id.* That is incorrect for several reasons.

Factually, *Burns* could not have decided that the one-person, one-vote principle fails to protect voters from having their votes debased because the Hawaii plan at issue *did* protect voters. Statement 23-24. Like Texas, Hawaii's population included a large and unevenly distributed number of non-voters. *Burns*, 384 U.S. at 80-81. Unlike Texas, however, Hawaii resolved the issue in favor of voter equality, using registered voters as its apportionment base. *Id.* The Court sustained Hawaii's decision against an equal-protection challenge. "Neither in *Reynolds v. Sims* nor in any other decision has this Court suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured." *Id.* at 92. In fact, including them would have been "'grossly absurd and disastrous.'" *Id.* at 94 (citations omitted). *Burns* held that apportionment based on total population is not required when doing so would undermine the rights of voters. But *Burns* did not decide the question here: whether a State may exclusively apportion based on total population when it *does* undermine voter equality.

Given the differences between the two cases, Texas is forced to bank its argument on two sentences from the opinion: "The decision to include or exclude any such

group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere. Unless a choice is one the Constitution forbids ... the resulting apportionment base offends no constitutional bar, and compliance with the rule established in *Reynolds v. Sims* is to be measured thereby." *Id.* at 92. But Texas misconstrues the statement. That passage merely identifies the question the Court has "carefully left open," *id.* at 91, and the remainder of the opinion explains why there was once again no reason to resolve it, *viz.*, because Hawaii's use of registered voters did not offend the Constitution.

Texas makes much more of the Court's reference to the "choices about the nature of representation" than can be fairly drawn from the decision. Motion 7. Nothing about this comment suggests states have unfettered discretion to choose any "particular apportionment method" they prefer regardless of the effect on voters. *Id.* 6. After all, if states possess the latitude Texas claims here, the Court would not have explained that there must be, at the end of the day, some apportionment base "against which compliance with the Equal Protection Clause is to be measured." *Id.* at 92. The Court has been appropriately reluctant to interfere with apportionment decisions where there is no indication that the "choice is one the Constitution forbids ...." *Id.* But the question here, unlike in *Burns*, is whether using total population for apportionment is a choice the Constitution forbids when it results in grossly unequal treatment of eligible voters.

Further, Texas does not even try to explain why the Court closely examined Hawaii's use of registered voters if "a State's choice of a particular measure, or combination

of permissible measures, is simply a policy choice left to the legislative process." Motion 12. That is because there is no explanation other than the Court needed to assure itself that the use of this particular metric, as opposed to other more generous and perhaps more appropriate definitions of "state citizenship," such as citizen voting age population, which would have counted all "those eligible to register and vote," *Burns*, 384 U.S. at 92, did "not *on this record* fall short of constitutional standards." *Id.* at 97 (emphasis added). There is no way to reconcile Texas's argument with the way the Court actually applied the one-person, one-vote principle in *Burns*.

Indeed, the Court would be quite surprised to discover that it decided the question in *Burns* given that it declared the issue open only two years later in *Hadley v. Junior College District of Metropolitan Kansas City*, 397 U.S. 50 (1970). Texas claims the issue the Court "found 'no need to decide'" was "whether the chosen base was among the permissible choices." Motion 17 (quoting *Hadley*, 397 U.S. at 57 n.9). That is correct, and it proves that Texas is wrong here.

Hadley confronted the same choice presented here: between total population and an apportionment base that counted only those whose rights were implicated in the districting process (there, school-age population). 397 U.S. at 51-52. If Texas's reading of *Burns* were correct, it would have been a settled issue: the jurisdiction would have had free rein to choose either one. But the Court did not see it that way. As the Court explained, there remained "some question" as to whether "actual population" or "school enumeration" was the constitutionally appropriate "basis for apportionment." *Id.* at 57 n.9 (citing *Burns*, 384 U.S.

at 90-95). In other words, *Burns* had not already resolved the issue. *Hadley*, too, provided no occasion to resolve it because, either way, the plan at issue failed to "insure that each person's vote counts as much, insofar as it as practicable, as any other person's." *Id.* at 54. "Accordingly, the Court has never determined the relevant 'population' that States and localities must equally distribute among their districts." *Chen v. City of Houston*, 121 S. Ct. 2020, 2021 (2001) (Thomas, J., dissenting from denial of certiorari).

Moreover, the Ninth Circuit "has held that districting based on voting populations instead of the total population would have been unconstitutional." *Id.* (citing *Garza v. County of Los Angeles*, 918 F.2d 763, 773-76 (9th Cir. 1991)). Judge Kozinski disagreed, finding that *Burns* "can only be explained as an application of the principle of electoral equality; the Court approved the departure from strict population figures because raw population did not provide an accurate measure of whether the voting strength of each citizen was equal." *Garza*, 918 F.2d at 784 (Kozinski, J., concurring and dissenting in part). The only thing the majority and Judge Kozinski agreed on was that the position Texas takes here is wrong.

Not even the appellate courts on Texas's side of this dispute believe *Burns* resolved the issue. To be sure, these courts think that *Burns* leads that way. *Chen v. City of Houston*, 206 F.2d 502, 526 (5th Cir. 2000); *Daly v. Hunt*, 93 F.3d 1212, 1224-25 (4th Cir. 1996). But both courts struggled with the issue and neither thought *Burns* definitively resolved it. Statement 15-16. Even the district court saw this as a "close" question. App. 14a. This could not be a close case if *Burns* decisively resolved the issue.

Regardless, the issue at this point is not who offers the more persuasive reading of *Burns*. The salient point is that the substantial issue is unresolved. Which party has the better view of the full body of precedent, including *Burns*, is the constitutional issue the Court will resolve *after* plenary review is granted.

Beyond its untenable *Burns* argument, all Texas can offer to avert plenary review are half-hearted gestures to certiorari denials and lack of a circuit split. Motion 9-11. But Texas understands that "these certiorari denials do not connote approval of the underlying decisions...." *Id.* 9. More fundamentally, this is an appeal—not a certiorari petition. The distinction matters. Because Congress made review mandatory, the Court will make a decision on the merits one way or the other. The present issue is whether this is a serious appeal or a frivolous one. Statement 12-13.

The absence of a circuit split also has no bearing on whether the question presented is substantial. This Court routinely grants plenary review in direct appeals in the absence of a split, often in cases far more fact-specific than this one. *See, e.g.*, *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015). And for good reason. Unlike in typical cases, this Court provides the first and only level of appellate review the district court's judgment will receive. Moreover, Congress has reserved this special process for important issues like constitutional challenges to statewide redistricting plans. That is why only frivolous challenges are denied ordinary appellate review. And that is why the one-person, one-vote appeals in which the Court has granted plenary review are legion. *See, e.g.*, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Board of Estimate of City of New York v.*

Morris, 489 U.S. 688 (1989); *Karcher v. Daggett*, 462 U.S. 725 (1983); *Brown v. Thomson*, 462 U.S. 835 (1983). *Burns* itself was a direct appeal. 384 U.S. at 83. This appeal is equally worthy of full review.

II. Texas Does Not Deny The Importance Of This Constitutional Question And Offers Almost No Defense On The Merits.

Although the criteria for granting certiorari review are inapplicable, this appeal passes that test too. Statement 16-25. Texas does not challenge the question's importance. The right to an equal vote "is the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Hence, "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Id.* at 562. As the *amicus* briefs supporting Appellants further explain, this case squarely implicates that important constitutional concern.

Indeed, Texas's approach is especially harmful to rural communities. Brief Amicus Curiae of Tennessee State Legislators, *et. al.* 13-25. In those instances where this concern arises, using total population instead of voting population will predominantly "burden rural interests by impermissibly counting ineligible residents in urban and suburban districts who are included in the total population count." *Id.* 19. The Court was quite rightly troubled when state geographic districting undermined the constitutional rights of urban voters. *Reynolds*, 337 U.S. at 556-67; *Gray v. Sanders*, 372 U.S. 368, 380 (1963) ("How then can one person be given twice or 10 times the voting power of

another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county?"). There should be equal concern now that circumstances have reversed.

Moreover, this "is not a Texas-only issue." Tennessee Legislators Br. 13. Just last month, the ACLU filed suit in Florida, claiming that inclusion of "the inmate population at Jefferson Correctional Institution ... unlawfully inflates the political strength of actual residents in the district that houses the prison ... and dilutes the voting strength of those living in all of the other districts in the county." Complaint, *Calvin v. Jefferson County Bd. of Comm'rs*, No. 4:15-cv-00131-MW-CAS (N.D. Fla. Mar. 9, 2015), ¶ 1. Like Appellants, the ACLU believes "[t]he 'one person, one vote' principle of the Equal Protection Clause of the Fourteenth Amendment mandates that each person's vote shall be equal to that of his or her fellow citizens." *Id.* ¶ 42. The issue also proved decisive in a recent case now on appeal to the Ninth Circuit. *Montes v. City of Yakima*, 420 F. Supp. 1377, 1390 (E.D. Wash 2014) ("The only disputed issue involves a purely legal question: whether districts which are approximately equal in total population, but which differ in eligible voting population, violate the 'one person, one vote' principle embodied in the Equal Protection Clause."). In sum, this important constitutional issue is recurring throughout the nation in all manner of communities, and for many different demographic reasons. The Court's guidance is needed.

The only basis for declining plenary review, then, would be because the decision below is obviously correct. But that is not the case. The one-person, one-vote principle makes no sense if—as Texas claims—it does not afford

voters an equal vote. Statement 17-19; *Chen*, 121 S. Ct. at 2021 (Thomas, J., dissenting from denial of certiorari) ("The one-person, one-vote principle may, in the end, be of little consequence if we decide that each jurisdiction can choose its own measure of population."). The whole point of the principle is that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds*, 377 U.S. at 355. If it does not protect against that, it protects nothing.

Texas offers little in the way of a defense. First, Texas argues that the decisions stating that the States need only equalize "population" undermine Appellants' argument. Motion 14-15. There is no question the Court has been "somewhat evasive in regard to which population must be equalized." *Chen*, 206 F.3d at 524. That is why the issue is substantial and needs to be decided here. But that does not mean Texas is correct. Contrary to Texas's argument, "[t]he Equal Protection Clause requires that legislative districts be of nearly equal population, *so that each person's vote may be given equal weight in the election of representatives.*" *Connor v. Finch*, 431 U.S. 407, 416, (1977) (emphasis added). When total population fails to protect voters, another apportionment base is required. *Gaffney v. Cummings*, 412 U.S. 735, 746 (1973).

Second, Texas argues that the drafting history of Section 2 of the Fourteenth Amendment "casts doubt on the notion that the Equal Protection Clause requires States to adopt a voter-population metric." Motion 18. But *Reynolds* rejected that argument. The "federal analogy" is "inapposite and irrelevant to state legislative districting schemes." *Reynolds*, 377 U.S. at 573; *Gaffney*, 412 U.S.

at 741 ("[T]here are fundamental differences between congressional districting ... and ... state legislative reapportionments."). Furthermore, even the decision from which Texas borrowed the theory acknowledged that "the overall context in which the amendment was drafted prevents any firm conclusion being drawn as to the framers' intent regarding the question before us." *Chen*, 206 F.3d at 527.

Last, Texas's political-question argument is meritless. Motion 22-23. Texas's stubborn insistence that its choice of an apportionment base is an unreviewable issue is nothing less than relitigation of *Baker v. Carr*, 396 U.S. 186 (1962), and *Reynolds v. Sims*. The Court has ruled that legislative apportionment challenges are justiciable and that districts must be equal to protect voters' rights. *Davis v. Bandemer*, 478 U.S. 109, 119 (1986) ("Since *Baker v. Carr* ... we have consistently adjudicated equal protection claims in the legislative districting context regarding inequalities in population between districts. In the course of these cases, we have developed and enforced the 'one person, one vote' principle.") (citing *Reynolds*, 377 U.S. 533). That is the end of the road for the political-question doctrine with respect to this issue.

The problem Texas faces, of course, is that *Chen*, *Daly*, and the decision below *did* invoke the political-question doctrine—they just did so without using that moniker. Texas thus gets points for candor. But it is nonetheless troubling that, more than 50 years after *Baker* and *Reynolds* settled the issue, Texas relies on the political-question doctrine to avoid judicial review of a classic one-person, one-vote claim.

III. Texas Agrees This Appeal Is The Ideal Vehicle For Deciding The Question Presented.

The parties dispute the merits, but they agree this is the right case to decide the issue. If Texas's exclusive use of total population in Plan S172 is constitutional, the decision below is correct. Motion 20-21. If Texas must equalize voter population, Plan S172 is unconstitutional. Statement 25-29. Accordingly, not only is the question presented squarely raised, fully vetted, and the solitary basis for dismissal below, it is decisive as to which party will secure final judgment. Especially given the direct appeal posture, it would be impossible to find a case better suited to definitive judicial resolution of this important equal-protection issue.

That Texas could have equalized *both* total and voter population only makes this appeal an even more attractive vehicle. *Id.* 27-29. Texas claims this should be irrelevant to the constitutional inquiry, and the district court agreed. Motion 21. But the fact that Texas could have equalized both means the Court need not decide in this case whether "representational equality" is a constitutional value or just a political one. All the Court must do to reverse the district court's decision is reaffirm the bedrock principle that the Equal Protection Clause protects the right of voters to an equal vote. There can be no doubt that the judgment below must fall if the one-person, one-vote principle provides *any* protection for eligible voters. Statement 28-29.

CONCLUSION

The Court should note probable jurisdiction and set this case for oral argument.

Respectfully submitted,

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